IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 282

SWIFT & COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

Appeal from the United States District Court for the Northern District of Illinois

MEMORANDUM FOR APPELLANT IN OPPOSITION TO THE MOTIONS TO AFFIRM

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INDEX

AUTHORITIES

CASES:

STATUTES:

Interstate Commerce Act:

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Pursuant to Rule 7, paragraph 3, of the Rules of this Court, Swift & Company, appellant, files this statement opposing the motions to affirm. The interveners' motion was served on August 9, 1951, the Interstate Commerce Commission's motion on August 11.

By way of preliminary, appellant notes that the United States, by not joining in these motions, concedes that the questions presented by the appeal are substantial. Of course such a concession admits nothing as to the merits. But an analysis of the two motions, in the light of what is said therein as to the issues raised and argued in appel-

lant's jurisdictional statement, and perhaps more particularly in the light of what is not said therein as to those issues, underscores both the substantiality of this appeal and the soundness of the Government's position respecting it. For this case simply bristles with issues which the moving appellees either evade or else do not even mention.

I. NEITHER MOTION DEALS WITH TWO GLARING ERRORS OF LAW APPARENT ON THE FACE OF THE COMMISSION'S REPORT.

A. At the outset, appellant pointed out that although the Commission rested its approval of the extra switching charge of $39.24* per car here in question on the ground that the livestock shipments sought by Swift without such charge would "adversely affect efficient and expeditious terminal operations generally and that operations would be disrupted," the Commission not only failed to prohibit such livestock shipments altogether, but specifically categorized as "not just and reasonable" the proposal of the Chicago Junction Railway to exempt livestock (other than that consigned to the Union Stock Yards) from the traffic which that carrier would transport. We pointed out that Swift was accordingly left free, if it chose to spend $233,604 a year for the purpose, since increased to $254,628.36, "seriously [to] interfere with, delay and disrupt terminal transportation operations and the movement of livestock generally," and that such a course would be perfectly lawful under the rulings below. We argued that this result, "plainly, makes neither good sense nor good law."

Faced with this obvious infirmity in the rulings sought to be reviewed, those who now urge that no substantial questions are here presented pursue different courses.

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*The amount of the switching charge was $28.80 at the time of the proceedings before the Commission and $36 at the time of the hearing below. After the appeal was allowed, the charge was increased by 9% in consequence of *Ex parte No. 175*, decided by the Commission August 2, 1951, and thus is now $39.24.

The interveners take refuge in silence, apparently in the view that the facile approach of "Out of sight, out of mind" not only avoids perplexities but also demonstrates their insubstantiality.

The Commission at least deals with the point. It says that "While the charge was entirely reasonable for the service the Commission knew it would be availed of when Swift had special need to have livestock moved in that way."

This is frank to the point of cynicism. This amounts to saying that the Commission knew that the charge was so high that Swift would never avail itself of the service, or, in plain English, that the Commission was enforcing a penalty in a situation where it had specifically ruled that an unequivocal prohibition was "not just and reasonable."

We doubt if the files of this Court will disclose a similar admission of covert regulation by any administrative agency, of any similar instance of a regulatory body forbidding indirectly what it frankly admits it cannot forbid directly. Even if this were the only issue in the case, it would be sufficient to call for extended argument. But it is far from being the only substantial issue on this appeal.

B. Appellant also pointed out, what is indeed apparent from inspection of the Commission's report, that it rested its dismissal of Swift's complaint, which had been based on Swift's present needs, on the ground that, if Swift's demand for the delivery of livestock at the line-haul rate were granted, "there would result demands from other packers requiring defendants to render like delivery service in an amount and volume which together with such service rendered [Swift]" would result in disruption (274 I. C. C. at 572). Appellant argued that "a carrier has no right to deny service now on the ground that in the future its capacities may be overtaxed," and pointed out that, even in cases of extreme congestion, all shippers were entitled to equality of treatment. *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121.

The Commission's report does not in our view answer these contentions adequately, and neither motion deals with them at all—unless the Commission's belated suggestion "that Swift has the preference in Chicago" because of its ownership of the sidetrack on the Chicago, Burlington & Quincy line can be thought to bear on the point.

Here again, we submit, silence, however dignified, does not establish insubstantiality.

II. UNITED STATES v. BALTIMORE & O. R. CO., 333 U. S. 169, REQUIRES REVERSAL OF THE RULINGS BELOW RATHER THAN AFFIRMANCE ON MOTION.

Appellant contends that the governing precedent here is *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, which declared unlawful a very similar discrimination at the Cleveland Stock Yards. This contention, also, is differently treated in the two motions. But in this instance it is the Commission which takes refuge in silence, while the interveners attempt to distinguish the cited case.

Actually, the Cleveland Stock Yards case is far closer to this one than the interveners' motion indicates. There, as here, Swift's sidetrack was physically connected with the carrier's main track.[1] There, as here, the carrier was prepared to deliver livestock at Swift's sidetrack upon payment of a substantial additional charge. There, as here, Swift as well as other packers were denied switching service as to livestock although given it as to other commodities.[2] There, as here, the discrimination was rested

[1] The Commission errs in its motion when it speaks of "Swift's proposed private side track." The track is in operation today (274 I. C. C. at 559, 563; see Exs. 2-8; Tr. 33, 37-39, 44-45, 47, 49-51). It is only the new plant and two stub tracks which are to be located on this sidetrack which are "proposed" (274 I. C. C. at 563). Needless to say, that plant could easily have been built during the many months (July 28, 1947-February 6, 1950) that this case was before the Commission.

[2] Interveners are in error when they say that in the Cleveland case "The defendant carriers continued to perform that service for appellant's competitors while refusing it to appellant." As this Court's opinion points out (333 U. S. at 174), "in 1938 the railroads ceased delivering livestock to the sidings of Swift *and other packers served by Spur No. 245*, although they have under agreement with Stock Yards continued to use the spur for delivery of all other kinds of commodity shipments to these sidings." (Italics added.)

on a contract between the carrier and the particular stockyards involved, by the terms of which the stockyards were to benefit at the expense of the consignee. The circumstance that in the Cleveland case that contract was exalted to the point of invoking constitutional protection for its provisions, see 71 F. Supp. 499, while in this case it was invoked to force the railroad interveners to oppose the shipper's complaint before the Commission (Ex. 57), is obviously a distinction of no more importance than the circumstance that the earlier case arose in Ohio while the present one concerns Illinois.

Indeed, the principal difference between the two cases is that in the Cleveland situation the Commission properly found that there had been a violation of, *inter alia*, Section 1(9) of the Interstate Commerce Act, while in the present case the Commission refused to find any such violation. It is doubtless for this reason that *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, is nowhere discussed in the Commission's motion to affirm.

The obvious similarity of the two cases, far from reflecting any such insubstantiality in the present appeal as would call for affirmance without argument,[3] all but suggest the appropriateness of a reversal on the motion papers. Cf. *United States* v. *Steffan*, 338 U. S. 902. But, in any event, the similarity of the facts and the dissimilarity of the results establish that appellant's contentions based on *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, are substantial by any standard.

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[3] Significantly enough, the carriers in the Cleveland Stock Yards case filed a motion to affirm on the ground that the district court's conclusions of law there (R. 185-189, No. 223, Oct. T. 1947; see opinion, 71 F. Supp. 499) "are so sound and logical in the application of elementary principles that reasonable minds can come to no other conclusion" (Motion, p. 3). This Court, however, noted probable jurisdiction, and, after argument, reversed. 333 U. S. 169.

III. NEITHER MOTION EXPLAINS HOW THE FACTOR OF CONGESTION CAN LEGALIZE AN OTHERWISE UNLAWFUL DISCRIMINATION.

If there is any rational factual difference between this case and *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, it must be in the circumstance that there is more congestion at the Chicago Junction Railway's yards here than there was at the Cleveland Stock Yards there. But to concede this difference still does not justify what was done here, where the cost of separating particular freight out of a congested freight yard has been assessed in its entirety against a single commodity consigned to a single shipper.

Movants' endeavor to rest the discrimination on the peculiar nature of livestock fails for a number of reasons. After all, livestock is not a novel subject of rail carriage. Its nature was duly considered when the Commission fixed the present basic rates thereon (*Livestock—Western District Rates*, 176 I. C. C. 1), besides which the Commission has twice specifically ruled that the rates on livestock include normal terminal services. *Omaha Live Stock Exch.* v. *Chicago & N. W. Ry. Co.*, 178 I. C. C. 1, 14; *Chicago Live Stock Exch.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 542.

Moreover, and this is of the essence here, at least 37% of the livestock consigned to the Union Stock Yards arrives there in consolidated trains (*i. e.*, intermingled with dead freight), so that switching and "set outs" are necessary to get that livestock to the Union Stock Yards. See 274 I. C. C. at 561-562. Yet neither the Union Stock Yards nor their consignees are subjected to the $39.24 a car switching charge in respect of that 37% so switched. Furthermore, considerable switching of livestock takes place earlier, since—although the Commission significantly fails to advert thereto—it is the fact that even the trains destined to the Union Stock Yards which consist of livestock exclusively are made up at the several line-haul carriers'

break-up yards from mixed trains arriving at Chicago.[4] Yet, although both the Commission's report and its motion to affirm expound at some length the delicate nature of livestock, neither undertakes to demonstrate that the livestock proposed to be switched to appellant's siding is any more fragile than the livestock which is presently being switched out of consolidated trains, sometimes twice within the Chicago switching district, for delivery at the Union Stock Yards. It is at this point that the attempt to justify the discrimination to which appellant is subjected by the rulings below breaks down completely.

Undoubtedly, the Chicago Junction handles a large volume of traffic. But the record strongly suggests, if indeed it does not compel, the inference that the congestion now relied upon to justify the discrimination practiced against appellant is a consequence of the fact that the Chicago Junction's motive power has been reduced by 45% since it was leased by the intervener-appellee New York Central. It is for that reason that appellant urges that the Junction must be considered as a part of the New York Central, as required by Section 1(3)(a) of the Act; why appellant invokes Sections 1(10) and 1(11), which together require the carrier to render adequate switching service; and why appellant argues that the case in this aspect is governed by the rule of *Mitchell* v. *United States*, 313 U. S. 80, to the effect that inadequacy of facilities does not legalize a discriminatory practice.

The only answer attempted by movants to any of the foregoing is the Commission's comment in its motion that "The assumption that the use of any number of engines over 47 would slow down deliveries is much more logical

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[4] The railroad interveners' operating witnesses testified, without contradiction or dispute, to the switching of livestock cars which takes place, at the break-up yards and in many instances at localities outside of Chicago as well, before any trains are moved to the Union Stock Yards. See Tr. 549 (C. B. & Q.), 587-589 (C. & N. W.), 611, 612-613 (C. R. I. & P.), 650-651 (C. M. St. P. & P.), 678-679 (A. T. & S. F.). Counsel for the railroad interveners called witnesses from only 5 carriers out of the 22 he represented in order to avoid repetitiousness (Tr. 672).

it would seem, then that an additional number would facilitate switching and relieve congestion." This notion, that more motive power means less switching service, appears to have been newly generated for purposes of the motion to affirm. It is perhaps not surprising that this bit of forensic invention is not based on anything in the Commission's report and that it is actually contradicted by the record. For the Superintendent of the Chicago Junction testified that that carrier did not have sufficient engines to take care of all of the industrial placement of cars (Tr. 422), and further (Tr. 424), "I know we have been trying to get some additional Diesel equipment. We want at least five of them if we can get them."

No decision of this Court even remotely suggests that congested facilities can legalize a discrimination otherwise unlawful. To the contrary, *Mitchell* v. *United States*, 313 U. S. 80, establishes that inadequacy of facilities does not justify discrimination, and that, where discrimination is palpable, "there is no room * * * for administrative or expert judgment with respect to practical difficulties" (313 U. S. at 97, *per* Hughes, C. J.)

The circumstance that, as the national economy continues to expand, more and more terminals are becoming congested and those already congested are becoming increasingly so, demonstrates the public importance of the congestion issue here, and serves additionally to underscore its substantiality.

IV. BY RELYING ON THE INTEREST IN "EXPEDITIOUS CENTRALIZED DELIVERY", THE RULINGS IGNORE THE VERY DIFFERENT INTERESTS PROTECTED AND SOUGHT TO BE ENFORCED BY THE INTERSTATE COMMERCE ACT, AND THUS EFFECTUATE AT APPELLANT'S EXPENSE A DISCRIMINATORY COVENANT BETWEEN CARRIER AND STOCKYARDS.

The Commission's report rests in substantial part on the supposed interest in the "expeditious centralized delivery" of livestock at the Union Stock Yards (274 I. C. C. at 568). This euphemism cloaks the circumstance that the Commission's ruling requires appellant to pay $39.24 a car more for livestock consigned to its own siding than commission merchants and other packers pay for livestock consigned to the Stock Yards, a few city blocks distant—and 37% of the latter shipments, as has been noted, arrive in consolidated trains, intermingled with dead freight, and so require switching before final delivery. Thus the Commission is forcing "expeditious centralized delivery" at the Yards—and consequently is enforcing the covenant (Ex. 57) which requires the Chicago Junction to be operated "in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the yards." For while consignees at the Stock Yards obtain the switching service at no increase over the line-haul rate, consignees at private sidetracks must either pay $39.24 per car additional or else, willy-nilly, pay yardage fees at the Stock Yards—fees which, be it noted, the Commission is without power to regulate. *Swift & Co.* v. *United States*, 316 U. S. 216.

It is no answer for the Commission now to say that "the lease of Junction to the River Road [New York Central subsidiary] completely divested the stockyards of operations and controls of the terminal railroad." The fact that the Stock Yards invoked the covenant and thereby forced the intervener railroads to defend the present proceeding,

which they would not otherwise have done (Ex. 57), supplies indisputable proof that the covenant is still very much alive, and that in fact the Stock Yards still exercise a significant residue of control over the operations of the Junction and its lessor. And the Commission, by giving effect to the interest in "expeditious centralized delivery" at the Stock Yards, is, despite protestations to the contrary, actually enforcing that covenant.

The vice of the rulings below is that they ignore the plain provisions of the Interstate Commerce Act. That statute says nothing of "expeditious centralized delivery". To the contrary, it provides in Section 1(9) that, after a switch connection is in operation, and appellant is operating one here, it then becomes the duty of the carrier to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." The statute thus protects expeditious *decentralized* delivery at private sidetracks. The Commission's bland disregard of the statutory command accordingly emphasizes, from still another aspect, the substantiality of the present appeal.[5]

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[5] Interveners exhume the old canard that the packars, who once made the Union Stock Yards their own terminal, are now in substance to be estopped by their prior conduct. This argument ignores the controlling circumstance that, after the packers were divested of all financial interest in any stockyards by the antitrust decree (see *Swift & Co.* v. *United States*, 276 U. S. 311, 328; *United States* v. *Swift & Co.*, 286 U. S. 106, 111), more than one stockyards, thus free from the packers' control, has sought to exact fees for unwanted services. Thus, in *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, the Cleveland Stock Yards began to assess yardage fees on livestock passing over its Track 1619 at about the time of divestiture. See R. 34, No. 223, Oct. T. 1947. A similar insistence on imposing yardage fees at Chicago for services not desired by the consignees of direct shipments is reflected, not only in this case, but also in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195; and *Swift & Co.* v. *United States*, 316 U. S. 216.

V. THE DISCRIMINATION APPROVED AND PERPETUATED BY THE RULINGS BELOW CANNOT BE WAVED ASIDE BY CALLING THIS A "RATE" CASE.

Both motions assert, in substantially similar language, that this is a "rate" case, "that the lawfulness of a particular rate or rates is a matter for the informed judgment of the Commission, and the determination of that expert body will not be disturbed if supported by substantial evidence of record."

But this is a too facile verbalism, and a thoroughly misleading one. For almost every unlawful discrimination involves an inequality in rates, and so is, in the movants' view, a "rate" case.

Thus, in the Cleveland Stock Yards case (*United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169), all that was involved was a rate; the stockyards there was perfectly willing to have the carrier move livestock over its Track 1619, provided only that someone paid it the equivalent of a yardage fee. Indeed, the carriers paid such fees on such shipments for a number of years (R. 34, No. 223, Oct. T. 1947). The controversy arose when the carrier refused any longer to absorb such yardage fees as part of the line-haul rate for delivery of livestock to Swift's Cleveland siding. After the Cleveland Stock Yards case was docketed in this Court, the Commission vigorously opposed the carriers' motion to affirm the judgment in that case (see Memorandum in Opposition, &c., No. 223, Oct. T. 1947), although on the Commission's present theory that would have been a "rate" case too.

Appellant here attacks the switching charge itself as discriminatory, quite apart from its amount. Or, in other words, as this Court early recognized (*Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U. S. 263, 277), "a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an

unreasonable preference under sections 2 and 3." The present cause would be a "rate" case only if appellant's arguments were limited to a contention of unreasonableness in violation of what is now Section 1(5) of the Act; but of course their reach is far broader.

Indeed, the short answer to movants' present contention is what the Commission itself said in its report here (274 I. C. C. at 559):

> The issue presented is whether or not complainant is entitled to have direct shipments of livestock delivered by the Junction without a charge in addition to the line-haul rates on a private siding at a plant which it proposes to construct in the stockyard area in Chicago.

On the Commission's own statement of the basic issue, therefore, it is obvious that this is no "rate" case, and that the present contention to the contrary (which, assuredly, was formulated rather tardily), is wholly untenable.

VI. THE ISSUES RAISED REQUIRE REVIEW.

Appellant has shown, somewhat summarily, that the discrimination here practiced and sanctioned runs counter to principles and decisions long considered settled, of which *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, is simply the latest, and factually perhaps the closest.

Both motions to affirm, however, insist at some length that the discriminatory switching charge now under attack is foreclosed by the ruling in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193. In truth, however, the switching charge issue did not even lurk in that record after it reached the courts. It is true that in the proceeding before the Commission (*Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553), the switching charge was sustained, but Hygrade did not question that phase of the Commission's action. It was the carriers and the Union Stock Yards that sought to set aside the

Commission's order in respect of the yardage fees. The switching charge was therefore simply not in issue in the judicial proceedings. See answer of Hygrade, R. 50-54, Nos. 606-607, Oct. T. 1934. Consequently, both the statement of the interveners, that "this appeal involves the same questions before the Court" in 295 U. S., and of the Commission, that "The holding as to the reasonableness of the rate was not questioned or disturbed by the Supreme Court on appeal," are at best thoroughly misleading—though indeed they emphasize the movants' strong present disinclination to submit that same switching charge to the scrutiny of this Court.

Appellant has already pointed out in its jurisdictional statement that the present issues were expressly reserved in *Swift & Co.* v. *United States*, 316 U. S. 216, 227.

It is not, however, necessary to prolong the discussion; we submit that we have sufficiently shown that this case presents something to discuss. The Solicitor General, who has refrained from filing a motion to affirm, evidently agrees. Consequently, unless the Court is of opinion that its own recent decision in *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, calls for summary reversal, this case should be set down for argument.

Respectfully submitted,

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